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SEP. 9 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1957.

No. 296.

RAYMOND N. HEISELMOYER,
Petitioner,

v.

THE PENNSYLVANIA RAILROAD COMPANY,
Respondent.

PETITIONER'S REPLY BRIEF.

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This brief is submitted in reply to respondent's brief in opposition to the Petition for Writ of Certiorari.

ARGUMENT.

Point I.

Respondent's Statement of the Case Is Inaccurate and Significantly Incomplete.

At the very outset, respondent says in its brief that the first action, which is the case in the instant Petition, was "... an action under the Boiler Inspection Act. ..."[1] Thus does respondent at the outset strike a false note that the Safety Appliance Act issue in the case is just an afterthought on petitioner's part. For the sake of consistency in its later argument which incessantly and inaccurately dwells on this theme, respondent is forced into such an as-

1. Respondent's brief, p. 2.

sertion. Yet the truth is that at the very outset of the litigation petitioner's complaint alleged the following statutory bases for the case at bar:

> "1. This action arises under the Act of Congress, April 22, 1918, c. 149, 35 Stat. 65, and amendments thereto, U. S. C. A., Title 45, Sec. 51 et seq., and further amended by the Act of Congress approved by the President of the United States on August 11, 1939, Chapter 685—1st Session of the 76th Congress, known and cited as 'The Federal Employers' Liability Act', *and under the Safety Appliance Acts, Title 45, U. S. C. A., Sec. 1-23 inclusive.*" (Italics suppligd.) (4a)

The independent brake, which is the core of the first genuine issue presented here,[2] is treated mincingly indeed by respondent. One could not discover from reading its "Statement of the Case" that this brake is an air brake—a power brake—which controls the brakes on the engine alone (77a-78a), and, as such, a brake that palpably fits the qualifications of a "power driving-wheel brake" laid down in the Safety Appliance Acts pertaining to brakes, 27 Stat. 531, 45 U. S. C. § 1, 45 U. S. C. A. § 1. Respondent had to mask this fact to serve the design of its subsequent argument which mistreats the large issue of whether this is a statutory brake by virtually refusing to deal with it on its merits.

One is not able to tell from a reading of its "Statement of the Case" that the significance of the contact between the backrest of the engineer's seat and the independent brake valve is that the backrest prevented and interfered with the use and operation of this brake (89a-91a). But that condition, of course, runs afoul of the rule in *Richmond F. & R. Co. v. Brooks*, 197 F. 2d 404, 91 U. S. App. D. C. 24 (C. A., D. C., 1952) cert. den. 344 U. S. 828, 73 S. Ct. 31, 97 L. Ed. 644 (1952) and cases cited therein. Since that

2. See Petition, "Questions Presented", p. 2.

fact would embarrass respondent's subsequent argument, it is omitted.

Respondent says that ". . . the backrest would contact the independent brake valve handle if the latter was in the fully applied (brake on) position."[3] It then offers record references in documentation, and the only reference which brilliantly illuminates just what does happen upon contact—90a—proves the antithesis of respondent's statements. As petitioner testified there:

> "And if you have to go to use [the independent brake valve] in a hurry to apply the brake, well, that back there, you'll just foul it. . . ." (90a)

And so too at 79a-80a (not cited by respondent) petitioner also testified:

> "When you have this back—*if this works in a swivel, of course, it would foul the independent brake; therefore, you wouldn't be able to work the independent brake; what we call a washout. If you have any difficulty making—shifting cars, if you wanted to stop in a hurry, if you have that back on, the way it was constructed at that particular time, it would foul. You wouldn't be able to apply that brake in a hurry.*" (Italics supplied.) (79a-80a)

See also 139a-140a.

A power brake that cannot be applied in emergencies or other circumstances, turns a locomotive into a deadly machine capable of killing and injuring railroaders and members of the public at large. This uncontroverted evidence, badly misstated by respondent, dramatizes the first real issue in the case and explains the Congressional purpose behind the Safety Appliance Acts pertaining to brakes more trenchantly than pages of argument. It fits respondent's scheme to invert the plain meaning of this testimony for an applied brake that could be released by the fouling

3. Respondent's brief, p. 2.

of the seat lacks the manifest hazard that inheres in a released brake that cannot be applied because of that fouling. Thus respondent attempts to blunt the facts and dull the real issue here which should have been held, as a matter of law, to be a violation of 45 U. S. C. § 1 or at least submitted to the jury as petitioner requested (565a-566a).

Point II.

Respondent's Treatment of the Issue of Statutory Coverage of the Independent Brake Is Factually as Deficient and Legally as Erroneous as the Decision Below.

In what is virtually its only argument on the issue of statutory coverage of the independent brake, respondent simply dilates the first of three erroneous views of the court below,[4] and it can be dispositively answered in the same fashion.[5]

There are three independently conclusive answers to respondent's assertion that "... the court of appeals [sic] did not decide whether the independent brake was or was not a safety appliance within the meaning of 45 U. S. C. § 1."[6]

1. If the court below had chosen not to decide this squarely raised issue, it could have done just that, and it would have ruled accordingly as it does when appellate issues warrant being left unsettled. See, for instance, *Snyder v. Lehigh Valley Railroad Company*, 245 F. 2d 112 (C. A. 3, 1957).

2. The reason the question was decided by the court below is that a complete adjudication of the appeal could not be reached without a ruling on the point.[7]

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4. See Petition, pp. 9-10.

5. See 64a-65a (our opening speech to the jury prior to any testimony), 77a, 79a-80a, 89a-91a, 139a-140a, 228a, 341a, 565a-566a, 551a-552a.

6. Respondent's brief, p. 5.

7. See Petition, pp. 5, 8-13.

3. If the decision below is not reviewed by a grant of this Petition and the judgment reversed, every railroad defendant in cases in which employees or the public at large invoke 45 U. S. C. § 1 as the basis for relief for injuries arising out of malfunctioning independent brakes will indubitably (and accurately) claim that the Court of Appeals for the Third Circuit exempted the independent brake from coverage under 45 U. S. C. §1. We think it fair to suggest that the instant respondent in such circumstances would be the last to concede—although it is presently the first to argue—that the court below never so held. It is in just this intensely realistic sense that we assert in our Petition that our precedent jurisprudence will claim the roundly affirming decision of the Court of Appeals for the Third Circuit as bearing a holding on the point. And it certainly does.

The merits of this substantial question of first impression in this Court enjoy nothing more than a footnote in respondent's brief.[8] In response we rest on our analysis in the Petition.[9]

If the Court will turn now to the first of respondent's "Questions Presented" [10] it will see clearly the sterility of that contrived issue. There is no question in the full context of this case that the square issue now before this Court is whether the independent brake is a statutory appliance under 45 U. S. C. § 1. The issue is novel, and it is substantial and standing alone warrants the grant of the Writ.

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8. Respondent's brief, fn. 11, pp. 14-15.

9. Petition, pp. 11-15. To respondent's niggling suggestion that only a switching move was involved in the facts at bar, (Respondent's brief, fn. 11, p. 15) we hasten to advise this Court that it has again been misled. The move involved here was from Ernest down to Lavino's plant, (104a-105a), from a recognized tower on respondent's main line operation to a plant in and out of which petitioner's job would carry him in the movement of cars across the main line. No one knows this better than respondent which publishes timetables so indicating, and it is inexcusable that it would even suggest the contrary here.

10. Respondent's brief, p. 1.

Point III.

The "Safe Place to Work" Doctrine—A Doctrine of Negligence—In a Case Under the Boiler Inspection Act Is Alien and Erroneous and Yet It Was Injected Into the Jury Charge Here. Respondent as Well as Petitioner Protested Exactly That Error When It Was Committed, But Since the Verdict in Its Favor It Has Dissembled Its Originally Frank and Accurate Position in Obfuscating Argument.

We respectfully submit that our second "Questions Presented"[11] of itself warrants the grant of the Writ and reversal of the judgment below. The requisite conflict in authorities and magnitude of the issue are patently present.

Respondent attempts to resist our argument with flimsy devices. Disciplined reference to the record discloses that its position is without a single substantial underpinning. And if we read respondent's devious argument against the following portion of the record, all of that argument turns out to be the only real afterthought in a case unfortunately overburdened with irresponsible charges about fancied ones.

Immediately following the trial court's charge which contained the erroneous injection of the "safe place to work" doctrine into the test for "unnecessary peril" under the Boiler Inspection Act (533a-534a),[12] counsel came to side bar to apprise that court of their objections to the charge before the jury retired for its deliberation (548a).

During the course of that conference counsel for *respondent* advised the trial judge as follows:

> "I would also except to Your Honor's comments about safe place to work with reference to the first cause of action, the Locomotive Inspection Act case. I don't

11. Petition, p. 2.
12. See also Petition, p. 17.

think that is proper in that part of your charge." (553a)

This objection is with stark exactitude the very stuff of which our second "Questions Presented" is made.

With this most valuable confession in hand, let us now examine the formulation of respondent's second "Questions Presented" and peel away its overlay of argument.

As we proposed in our second "Questions Presented" the serious issue at bar asks whether the prohibition of the Boiler Inspection Act against "unnecessary peril" is not absolute and the test of compliance in no way related to negligence. We directly argued the point in our Petition,[13] and objected when the error was committed (548a-549a). Respondent answered that argument in its brief by fleeing into the "language of the statute" which was used in the charge. That same "language of the statute" was used to contrive respondent's second hollow "Questions Presented".[14] It is sufficient to say that we have never disclaimed the use of such language. What we have argued and press with all our vigor is that the intrusion of the "safe place to work" doctrine in the same instruction as that embodying the language of the statute is the confounding of two totally unrelated, indeed antagonistic, doctrines of law: absolute liability and negligence. They are immiscible, and to submit them together to a jury in a case under the Boiler Inspection Act can only result in the eradication of the absolute liability under the statute. That is the nub of the error here, and nothing respondent has said gainsays it. That is what must be corrected and clarified by the grant of the Writ and reversal of the judgment below.

Respondent advances the argument that the charge with respect to the action under the Boiler Inspection Act

13. Petition, pp. 17-20.

14. Respondent's brief, p. 1.

". . . is not cast in terms of negligence".[15] What then was respondent's counsel originally objecting to if not just that?

Respondent accuses *us* of ". . . seek[ing] to misrepresent and distort [the charge] by the repeated use of a label—'"safe place to work" doctrine'—which played no part whatsoever in the charge."[16] If it played no part then the original objection of respondent's resourceful, experienced counsel at the exact time the error was committed is gibberish. What was he talking about if not the error in question?

Respondent's behavior with respect to this genuine, important issue is cynical, arrant expediency and nothing less. It is regrettable that an issue of such quality and magnitude should be so grotesquely and equivocally treated. This Court now sees in very dramatic fashion exactly what respondent has done to bury this whole problem along with its original candor silently in an unmarked grave. We earnestly urge that this should not be permitted to happen. The Writ should issue.

CONCLUSION.

Petitioner was deprived of the benefits of the Safety Appliance Act pertaining to brakes, 45 U. S. C. § 1, when the courts below exempted the independent brake of a locomotive from coverage under the Act, yet that vital braking mechanism common to most locomotives meets every known standard of coverage.

The issue of statutory coverage of this critical power brake is, we respectfully submit, notably reviewable by this Court. It has the magnitude and uniqueness which justify adjudication here, raising as it does an important problem in the interpretation of a remedial Act of Congress. We look in vain to respondent's Brief, which studiously avoids

15. Respondent's brief, p. 16.
16. Respondent's brief, p. 17.

the merits of the issue, for a single reason for denying the Writ in the face of these compelling considerations.

The test of compliance with the strictures of the Boiler Inspection Act as to "unnecessary peril", 45 U. S. C. 23, is absolutely unrelated to negligence, yet a fandamental doctrine of negligence—"safe place to work"—was woven into the fabric of the jury's instructions on the Act. Both parties protested the error before the verdict, but respondent thereafter in a cynical dissemblance has raised vacuous disclaimers as to that root error. Its post-verdict behavior in this regard is a regrettable expediency which has denied this large issue the responsible treatment it deserved at respondent's hands.

As a result of the error below, the appellate court conflict requisite to the grant of the Petition obtains at every point originally asserted by us in the Petition. Furthermore, the question has prodigious importance for the future safety of untold thousands of railroaders and the public at large as well as for the integrity of the Congressional purpose aimed toward that end.

For all the foregoing reasons, we respectfully urge that the Writ of Certiorari should issue.

Respectfully submitted,

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